

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BOOMJ.COM, a Nevada corporation, and
LINLITHGOW a Nevada limited liability
company,

Plaintiffs/Counterdefendants,

v.

GEORGE PURSGLOVE, an individual;
DOES 1 through 50, inclusive, and ROE
CORPORATIONS I through X, inclusive,

Defendant/Counterclaimant.

Case No. 2:08-CV-00496-KJD-RJJ

ORDER

Presently before the Court is Defendant/Counterclaimant's Motion in Limine (#106) to exclude the Mark Guest letter from evidence and to preclude the Plaintiff's expert, Jeffery S. Herrell, from testifying at trial as to the ultimate factual issues based on the Mark Guest letter. Plaintiffs/Counterdefendants filed a response in opposition (#110) to which Defendant replied (#113).

I. Facts

Plaintiff Boomj.com is a Nevada corporation that developed a website aimed at appealing to Baby Boomers and Generation Jones. Defendant George Pursglove began working at Boomj on or about October 1, 2006. On or about November 14, 2006, Pursglove was named CEO of Boomj. In

1 his capacity as CEO, Pursglove was issued 3.4 million shares of Boomj stock. On or about October
2 25, 2007, Pursglove resigned his position with Boomj. The parties dispute whether Pursglove's
3 shares were subject to a vesting term.

4 On February 15, 2008, Boomj filed the present Complaint asserting claims for Breach of
5 Confidentiality/Non-Compete Agreement, Breach of Post-Confidentiality Non-Compete Restrictive
6 Covenant, Breach of Fiduciary Duties, Fraud Misrepresentation, Conversion, Trespass to Chattel,
7 Intentional Interference with Contractual Relations, and Injunctive Relief.

8 On May 6, 2008, Pursglove filed an Answer denying all allegations. Simultaneously,
9 Pursglove also filed a Counterclaim for Breach of Contract, Breach of Implied Covenant of Good
10 Faith and Fair Dealings, Breach of Fiduciary Duties, Fraud and Misrepresentation, Claim to Recover
11 Wages Pursuant to NRS 608.030, Unjust Enrichment, Intentional Interference with Prospective
12 Economic Advantage, Negligent Interference with Prospective Economic Advantage, Abuse of
13 Process, Conversion, Declaratory Relief Pursuant to NRS 30.040 and Injunctive Relief.

14 Plaintiffs, to establish their contention that Pursglove's Boomj stock was subject to vesting,
15 have hired Jeffery S. Herrell ("Herrell"), an expert on the legal needs of early stage and start up
16 companies. Herrell was asked to provide a report regarding the dispute between Plaintiffs and
17 Defendant, specifically his perspective on whether Pursglove's shares were subject to vesting.

18 To familiarize Herrell with Boomj so he could write his report, Plaintiffs provided Herrell
19 with a total of fifty-eight (58) documents including a letter which Plaintiffs assert was written by
20 Mark Guest ("Guest"). Guest had considered becoming a founder of Boomj early in the company's
21 creation, but ultimately chose not to pursue the prospect. Guest was never issued any Boomj stock,
22 but according to the letter he was informed about Boomj stock at the same time and in the same
23 manner as Pursglove. The letter details Guest's understanding of Boomj stock ownership. The letter
24 also states that Guest and Pursglove knew Boomj stock would be subject to a vesting period. The
25 letter was filed with the Court on October 27, 2009. It was not in the form of an Affidavit or
26 Declaration nor is Guest's signature notarized.

1 Herrell's statement discusses the contents of the Mark Guest letter as well as some of the
2 other fifty-eight (58) documents he reviewed. The report reaches the conclusion that the Plaintiff's
3 actions were "not inconsistent with those of a company that intends to follow what is, in [Herrell's]
4 opinion, the ordinary course of business and attach vesting provisions of capital stock that it is
5 issuing to its founders."

6 II. Motion to Exclude the Mark Guest Letter

7 Defendant has moved to exclude the Mark Guest letter from evidence. Defendant argues that
8 the letter is unauthenticated hearsay under Fed.R.Evid. 801. In response, Plaintiffs agree that the
9 Mark Guest letter is "clearly hearsay" and further state that they "have no intention of introducing the
10 Mark Guest letter at the time of trial." Therefore, the exclusion of the Mark Guest letter is not in
11 dispute. When the "resolution of the issue presented cannot really affect the [party's] rights, there is,
12 generally speaking, no case or controversy for the courts to adjudicate; no real relief can be
13 awarded." Smith v. University of Washington, Law School, 233 F.3d 1188, 1193 (9th Cir. 2000).

14 Here, because the parties agree the letter is hearsay and that it will be excluded from trial, the
15 Court's decision on whether to exclude the letter as hearsay from the trial will not affect the
16 Defendant's rights. Defendant can reintroduce this objection at trial if the Plaintiff attempts to
17 introduce the Mark Guest letter at that time. Accordingly, the Court denies as moot Defendant's
18 motion in limine on the Mark Guest letter.

19 III. Motion to Preclude Plaintiff's Expert Witness Jefferey S. Herrell from Testifying as to Ultimate 20 Factual Issues Based on the Mark Guest Letter

21 Defendant has moved to preclude Plaintiff's expert witness, Jefferey S. Herrell, from testifying
22 at trial as to the ultimate factual issues based on the Mark Guest letter. It is not disputed that Herrell
23 is a qualified expert and Herrell has provided a report pursuant to Fed.R.Civ.P 26(a)(2)(B).

24 The report is Herrell's application of his own perspective, experience, and knowledge of early
25 stage and start up companies to the information he was provided by Boomj. Herrell lists fifty-eight
26 (58) documents he reviewed to form his report, one of which is the Mark Guest letter. According to

1 the report, the Mark Guest letter claims that the Defendant “agreed that no shares would be vested
2 prior to the completion of at least one year of service” to Plaintiff Boomj. In the same paragraph
3 Herrell opines that “it is typical for a company to impose vesting terms on the members of its
4 founding team and as such, a vesting agreement with Pursglove would not be unusual.”

5 Defendant claims that such a basis for an expert opinion should preclude Herrell from
6 testifying at trial as to the ultimate factual issues based on the Mark Guest letter. Defendant’s
7 definition of the “ultimate factual issues based on the Mark Guest letter” includes any testimony by
8 Herrell regarding the existence of a vesting schedule - because Herrell relied in part on the Mark
9 Guest letter in forming his expert report. Defendant argues that Herrell should be precluded from
10 relying on the Mark Guest letter to support the existence of a vesting schedule because the letter is
11 unreliable in addition to being inadmissible hearsay.

12 Defendant claims the letter is unreliable because it is an “unauthenticated hearsay letter that
13 was written three years after the incident in question, two months before the discovery deadline, and
14 almost two years after the complaint was filed, from an individual who has never become a part of
15 the company and is known to have a substance abuse problem.” It is not disputed that the letter is
16 inadmissible hearsay. Defendant believes that because Herrell relied in part on the letter, he should
17 be precluded entirely from testifying regarding the existence of a vesting schedule. The Court
18 disagrees.

19 Fed.R.Evid. 703 outlines the type of information an expert witness may rely upon in forming
20 an opinion or inference:

21 The facts or data in the particular case upon which an expert bases an opinion or inference may
22 be those perceived by or made known to the expert at or before the hearing. If of a type
23 reasonably relied upon by experts in the particular field in forming opinions or inferences upon
the subject, the facts or data need not be admissible in evidence in order for the opinion or
inference to be admitted.

24 Therefore, Herrell may correctly rely upon the Mark Guest letter if it is the type of
25 information experts in the field of newly formed and start up companies reasonably rely upon in
26 forming opinions or inferences. The Court finds that it is. It is a logical assumption that an expert

1 who is evaluating the business practices of a company would communicate with individuals who are
2 familiar with or have a relevant connection to that company. The fact that the letter was written three
3 years after the incident in question, two months before the discovery deadline, and almost two years
4 after the complaint was filed, is not fatal. Guest's understanding, as evidenced by the letter, would
5 potentially be probative on the issue of whether the company was offering unvested stock to
6 prospective employees. Plaintiffs have indicated that the letter was written for the convenience of
7 Herrell, and therefore it is expected that the letter was written after Herrell was brought on as an
8 expert witness and not soon after the events it describes. Defendant has not substantiated his claim
9 that Guest "is known to have a substance abuse problem" and therefore any assertion that the letter
10 was unreliable and Herrell should not have reviewed the letter on those grounds is unfounded.

11 Additionally, experts are permitted to rely on information that is otherwise inadmissible and
12 thus it is inconsequential that the letter is inadmissible hearsay.

13 Rule 703 further provides:

14 Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the
15 proponent of the opinion or inference unless the court determines that their probative value in
16 assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial
17 effect.

18 Plaintiffs, therefore, are prohibited from disclosing to the jury the existence of the letter,
19 which both sides agree is inadmissible hearsay, unless the Court determines the letter has more
20 probative value than prejudicial effect. The Court will address the probative value of the letter at trial
21 if that issue comes before it. Regardless, Herrell was permitted to review the letter even though it is
22 hearsay.

23 Additionally, although Herrell's report states he reviewed the letter, a close reading of the
24 report demonstrates Herrell barely relied upon the letter, if at all. The Mark Guest letter is referenced
25 one time in the entire report in the first paragraph of the section labeled "Analysis." Herrell notes
26 that the Mark Guest letter states that the Defendant "agreed that no shares would be vested prior to
the completion of at least one year of service" to Plaintiff Boomj. Herrell does not state whether he

1 believes that statement to be true nor does he claim to use that information to determine whether
2 there was in fact a vesting term or schedule. Rather, he states “[a]s stated above,” referencing his own
3 knowledge and experience, “it is typical for a company to impose vesting terms on the members of its
4 founding team and as such, a vesting agreement with Pursglove would not be unusual.” Defendant
5 agrees that Herrell has the knowledge and expertise to determine what is “usual” for a start up
6 company. Herrell’s reliance upon his own knowledge and his review of fifty-eight (58) documents
7 relevant to the formation of Boomj demonstrates that his report and testimony rest on a reliable
8 foundation.

9 Herrell’s report gives expert insight into the typical and plausible practices of a start up
10 company which intends to have a vesting term for its capital stock and uses appropriate support to
11 reach the conclusion that it is plausible Plaintiffs had such a vesting term. Notably, the report also
12 mentions how few of the typical start up company practices Plaintiffs actually followed. This
13 information, pursuant to Fed.R.Civ.P 702, will assist the trier of fact to understand the evidence to
14 determine a fact or issue. Accordingly, the Court denies Defendant’s motion in limine on this issue.

15 IV. Conclusion

16 Accordingly, IT IS HEREBY ORDERED that Defendant’s Motion in Limine (#106) is
17 **DENIED.**

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19 DATED this 3rd day of June 2011.

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22 _____
23 Kent J. Dawson
24 United States District Judge
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